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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

JEFFERSON ELECTRIC MANUFACTURING COMPANY

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on March 13, 1933.

OPINIONS BELOW

The opinion of the Court of Claims on demurrer is reported in 69 C.Cls. 150. The opinion of the Court of Claims on the merits is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

I. Whether respondent may recover manufacturers' excise tax paid under the provisions of Sec-

tions 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when such taxes appear to have been collected from respondent's customers and were not proved to have been returned to said customers as provided in Section 424 of the Revenue Act of 1928.

II. Whether under Section 424 of the Revenue Act of 1928 the court below had jurisdiction to enter a judgment for the refund of manufacturers' excise taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that said taxes had not been collected directly or indirectly from respondent's customers, or that said taxes had been returned to respondent's customers.

III. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the respondent were not primarily adapted, or specially designed for use in automobiles, motorcycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in Appendix A, *infra,* pp. 12–14.

STATEMENT

During the period beginning June 20, 1919, and ending April 21, 1926, respondent paid excise taxes aggregating $67,544.87 on ignition coils manufactured and sold by it (Finding 2).

Ignition coils were in use before the advent of the automobile, being used for stationary internal-combustion engines, and also for motorcycles and marine works (Finding 11). They were not specially designed for automobiles and were first generally used for that purpose about the year 1914. (Finding 11).

Respondent sold its ignition coils involved in this suit for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used (Finding 11). Some of the coils were sold to manufacturers, wholesalers, mail-order houses, and dealers but none were sold for original equipment (Finding 11). The adaptability of ignition coils for special engines did not depend upon the internal construction of the coil. (Finding 11). Respondent manufactured 15 or 20 different kinds of ignition coils (Finding 11).

Respondent's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines and to outboard motors and engines for concrete mixers and were not primarily adapted or specially designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons.[1]

Beginning May 19, 1923, and up to December 29, 1925, it was respondent's practice to note on its invoices to customers that 1/21 of the amount paid by customers equalled 5 per cent excise tax

[1] To this finding the Government has made certain objections, which appear in the body of the petition.

and that 20/21 indicated the purchase price (Finding 8). During that part of this period when a 2½ per cent rate was applicable the notations were 1/41 and 40/41 (Finding 8). It is not possible from the state of the record to determine the amount of excise tax paid for the period when respondent made the above notations on its invoices sent customers (Finding 10). At no time were respondent's catalogue prices increased or decreased by reason of the imposition of the excise tax (Finding 9). Prior to the period when respondent noted its invoices as indicated above, respondent did not add any amounts to the catalogue prices and did not collect any amounts additional to the catalogue prices because of the excise taxes (Finding 7). The catalogue prices collected were transferred to respondent's general ledger account without any separation into various elements, but the excise tax was set up in an additional account called "Excise Tax Expense" (Finding 7).

On May 28, 1923, respondent filed a claim for refund of excise taxes paid for the period beginning March 1919 and ending March 1923 in the amount of $48,080.83 (Finding 3). After having once rejected the claim in full, the Commissioner of Internal Revenue, on or about November 28, 1928, allowed the claim in the amount of $46,758.53 and rejected it to the extent of $1,322.30 on the ground that the latter amount represented tax passed on to respondent's customers (Finding 3).

On March 25, 1925, respondent filed a claim for refund of excise taxes for the period April 1923 through December 1924 in the amount of $15,363.79 (Finding 4). After having first rejected the claim in full the Commissioner of Internal Revenue, on or about November 30, 1928, allowed the claim in the amount of $768.76 and rejected it in the amount of $14,966.17 on the ground that the latter amount had been passed on to respondent's customers and that respondent had not filed the required bond (Finding 4).

On September 15, 1926, respondent filed a claim for refund of excise taxes for the period January 1925 through February 1926 for the amount of $5,051.41 (Finding 5). On November 22, 1928, the Commissioner rejected claim for refund on the ground that the amount thereof represented taxes passed on to respondent's customers and that respondent had not submitted the specified bond (Finding 5).

Respondent sought to recover the sum of $20,017.58, with interest, and the defendant counterclaimed for the amount of the refunds already paid, namely, $47,527.29, plus $21,737.37 interest (Finding 6).

After having overruled a demurrer to the petition the Court of Claims gave judgment for the respondent in the sum of $20,017.58 and dismissed the counterclaim.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondent was entitled to recover manufacturers' excise taxes paid under Sections 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when respondent had not proved that said taxes were not collected directly or indirectly from respondent's customers or, if so collected, that they were returned to respondent's customers.

2. In holding that the court had jurisdiction to give judgment for the respondent, although it affirmatively appeared that respondent had not established its right to a refund to the satisfaction of the Commissioner of Internal Revenue as provided in Section 424 of the Revenue Act of 1928.

3. In finding that respondent's ignition coils were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks, or automobile wagons.

4. In dismissing the petitioner's counterclaim and giving judgment for respondent.

REASONS FOR GRANTING THE WRIT

(1) In giving judgment for respondent solely on the ground that the ignition coils manufactured and sold by petitioner were not primarily adapted or specially designed for automobiles within the meaning of the taxing statute, the court below disregarded the provisions of Section 424 of the Revenue Act of 1928 which require a taxpayer, in

order to secure a refund of such taxes, to show that they were not collected directly or indirectly from the purchaser or lessee, or, if they were so collected from the purchaser or lessee, they were returned to him. The purpose of Section 424 of the Revenue Act of 1928 was to prevent the refund of excise taxes to a manufacturer when the manufacturer had not paid the tax but had passed it on to the consumer (House Report No. 2, p. 27, 70th Cong., 1st Sess). It wholly defeats the purpose of the statute if the rule laid down by it is not to apply in judicial proceedings as well as in administrative proceedings. Cf. *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 424. The court below did not find specifically whether the taxes in question had been collected directly or indirectly from respondent's purchasers or whether if so collected they had been returned to them, and we think that respondent did not offer proof to support such a finding. It appears that during most of the period out of which respondent's claims arise, it was respondent's practice to note on its invoices to customers that 1/21 was for excise tax, and that 20/21 indicated the purchase price (Finding 8). This is the most affirmative finding on the subject and seems clearly to indicate that the taxes were collected from respondent's customers. While it is true that respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise tax, yet that fact does not show that the tax was

returned to respondent's customers. We are aware of only one decision commenting upon a similar situation, and it was there held that an arrangement such as used by respondent in this case resulted in the taxes being wholly returned to the customers. *American Chain Co.* v. *Eaton,* 58 F. (2d) 248, 249 (D.C. Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783, (C.C.A. 2d). We do not share the view of the District Court that such a conclusion may be drawn from this method of paying the tax.

Respondent has failed to prove the facts required by Section 424 and is therefore not entitled to recover. The judgment of the court below defeats the purpose of the statute by allowing respondent to recover taxes which respondent has failed to prove were not paid by its customers.

Numerous cases involving refund of manufacturers' excise taxes under the statutes involved in this case are pending in the courts, and the question whether a taxpayer must prove not only the illegality of the tax but also that the tax has not been passed on to its customers is of great importance. In addition it seems that the question presented, or one very similar to it, can arise under the provisions for the refunding of manufacturers' excise taxes in the Revenue Act of 1932. Revenue Act of 1932, c. 209, Sec. 621, 47 Stat. 169, 267–268.

(2) In holding that there was jurisdiction to give a judgment for respondent, although it af-

firmatively appears that respondent had not proved to the satisfaction of the Commissioner of Internal Revenue that it was entitled to the refund, the court disregarded the plain provisions of Section 424 of the Revenue Act of 1928. That section provides that no refund of the manufacturers' excise taxes in question shall be made unless pursuant to a judgment of a court in an action instituted prior to April 30, 1928, or unless the taxpayer proves to the satisfaction of the Commissioner of Internal Revenue that the tax was not collected directly or indirectly from the purchaser or lessee, or if so collected that it was returned to the purchaser or lessee. It was clearly competent for the Congress to provide that it should be within the discretion of the Commissioner of Internal Revenue to make these refunds. Cf. *Williamsport Wire Rope Company* v. *United States,* 277 U.S. 551. The question presented was decided adversely to the contention of the Government in *Boyle Valve Co.* v. *United States,* 69 C.Cls. 129, and by a majority of the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715, (C.C.A. 3d).

In *America Chain Co.* v. *Eaton, supra,* the District Court seems to have decided this question against the Government. The Circuit Court of Appeals did not pass upon it.

In *Routzahn* v. *Willard Storage Battery Co.,* decided May 9, 1933, 1933 P.-H. Tax Service p. 1577, the Circuit Court of Appeals for the Sixth Circuit

seems to have held that in an action against the Collector the question presented does not arise until after judicial determination of the legality of the tax.[2]

(3) The ultimate finding of the court below is not simply a statement of facts from which a legal result may follow, but, in effect, it states that the facts of the present case are such as to place the respondent's ignition coils outside the legal definition of parts and accessories laid down by this Court in *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583-584. The finding answers the only legal issue involved in this branch of the case. While it is true that the findings of the Court of Claims are generally conclusive, and while there is generally no necessity for that court to support its findings by an exposition of the underlying circumstantial facts, it is not believed that those rules should permit the Court of Claims to make an ultimate finding which will conclude the parties as to the only legal issue involved when that finding is isolated and unsupported by any other facts the court has found. In the present case there was evidence before the court appearing in the report of the Commissioner of the Court of Claims that the respondent advertised its ignition coils as primarily adapted for use in automobiles. The transcript of

[2] Two decisions of the District Courts seem to support the contentions of the Government. *Twentieth Century Mfg. Co.* v. *Hopkins*, X-2 Cum. Bul. 408 (N.D. Texas); *Sterling Spring Co.* v. *Routzahn*, VIII-2 Cum. Bul. 358 (N.D. Ohio).

the Commissioner's report in this respect is set out in Appendix B, *infra,* pp. 15–16. The Court of Claims has in other cases recognized the importance of facts relating to advertising in the determination of whether particular products are parts or accessories within the meaning of the taxing statutes. See *Cole Storage Battery Co.* v. *United States,* 65 C.Cls. 164, certiorari denied, 278 U.S. 641; *Perfection Gear Co.* v. *United States,* 70 C.Cls. 422; *Edison Storage Battery Co.* v. *United States,* 67 C.Cls 543, 555. The Government is filing in connection with this petition a motion to remand the cause to the Court of Claims with directions to make additional findings with respect to respondent's advertising as a material fact in the determination of whether respondent's ignition coils were taxable as parts or accessories within the meaning of the taxing statutes.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX A

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, provides in part as follows:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof) except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
>
> * * * * *

The pertinent sections of the Revenue Acts of 1921 and 1924 are the same in so far as they relate to the issues of this case. Revenue Act of 1921, c. 136, Sec. 900, 42 Stat. 227, 291; Revenue Act of 1924, c. 234, Sec. 600, 43 Stat. 253, 322–323.

The pertinent provisions of Regulations No. 47, promulgated May 1, 1919, are as follows:

> ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon,

> other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities, such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. * * *

The parts quoted of the above Regulations were continued without material changes in Revised Regulations issued under the Revenue Acts of 1921 and 1924. Reg. 47, Art. 15 (1921); Reg. 47, Art 16 (1924).

Section 424 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 866 provides in part as follows:

> SEC. 424. *Refund of Automobile Accessories Tax.*
>
> (a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or

subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

APPENDIX B

With respect to respondent's advertising, the Commissioner reported to the Court of Claims as follows (p. 2, 3):

It [respondent] did, however, manufacture and sell several types of ignition coils which it very generally advertised as:

"Genuine Jefferson automobile ignition coils interchangeable with any of the standard battery ignition systems."

The plaintiff further advertised:

"The Jefferson line of automobile ignition coils consists of only a few types, which offer an exact replacement for any of the coils used as standard equipment. The coils are sufficiently flexible through the use of interchangeable fittings, adjustable caps and terminals, to enable one type of coil to be used to replace many of the different coils now in general use."

During the period involved herein it published and distributed charts describing and illustrating its so-called "Jefferson automobile ignition coils" indicating which of its several models of coils could be used as replacements on practically all makes and models of automobiles, and further specifically designated which of its several types of coils should be used as replacements in connection with the various standard lighting and ignition systems. One of the coils illustrated and described was the "Jefferson emergency automobile ignition coil" which

is illustrated with four types of brackets for mounting. That coil is described as follows:

> "The Jefferson emergency coil, with the three simple adapters supplied with it, makes it an interchangeable or replacement coil on all standard automobile ignition systems. A heavy duty condenser is built into the coil, which can be utilized in the ignition circuit or eliminated, as the particular replacement requires. For 12-volt systems a resistance unit is necessary.
>
> "The installation is very simple. Complete instructions and coil specification list are furnished with each coil."

Another type illustrated and described is the "Jefferson universal automobile ignition coil" which is illustrated with four types of brackets and a resistance unit. That coil is described as follows:

> "The Jefferson universal coil is designed for replacement on all standard battery ignition systems. It is the only ignition coil outfit which is universally adaptable to all standard battery ignition systems. The Jefferson universal coil represents the highest efficiency in coil construction. It is compact, dependable in performance, and very simple to install."

In one of its circulars captioned "Jefferson Automobile Ignition Coils" the replacement chart sheet carries the following heading:

> "The last word in automobile ignition coils. Jefferson coils are the only 100 per cent complete line on the market, and consist of only a few standard types. Our trade-mark identifies genuine Jeffersons—get them from your jobber."

U. S. GOVERNMENT PRINTING OFFICE: 1933